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Supreme Court of the United States

OCTOBER TERM 1945

No. 608

JAMES A. TAYLOR,

Petitioner,

against

NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

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NEW YORK CENTRAL RAILROAD COMPANY,

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Supreme Court of the United States:

JAMES A. TAYLOR hereby respectfully applies for a writ of certiorari to require the certification to this Court, for review and determination, of the final judgments of the courts of the State of New York which dismissed his complaint against the New York Central Railroad Company (hereinafter referred to as Central) for damages for personal injuries sustained by him through its negligence in the operation of an interstate train.

The Judgments Sought to Be Reviewed

The original judgment was by the Supreme Court of the State of New York, New York County. That judgment was rendered and entered on June 7, 1944, in the office of the Clerk of New York County. It was affirmed by the Appellate Division of the Supreme Court of the State of

New York, in and for the First Judicial Department, by judgment entered on March 1, 1945, in the office of the Clerk of New York County. The Court of Appeals, thereafter by order dated April 19, 1945, granted to the petitioner leave to appeal from the said judgments. Upon the appeal so taken, the judgments of the lower courts were affirmed in a decision rendered July 19, 1945, and by judgment, pursuant thereto, entered in the office of the Clerk of New York County on August 6, 1945. A copy of that judgment was served on the petitioner's attorney on or about, but not before, August 28, 1945, and petitioner had no notice of the entry of such judgment until that day.

A motion for reargument was submitted to the Court of Appeals on the first day that that Court sat after the rendition of its decision, namely on October 1, 1945, and was denied by that Court on October 11, 1945.

The Court of Appeals of the State of New York is the highest court of that State. Petitioner has no further redress in the State courts.

Basis of Jurisdiction

This petition is pursuant to Section 237b of the Judicial Code (Section 344b, Title 28, U. S. C.) on the ground that this case presents a federal question (in several aspects) which has been passed on by the highest court of the State of New York, adversely to the petitioner.

Petitioner claims, and in his action in the State Court claimed, a right, privilege and immunity under a statute of the United States and the United States Constitution; and the same has been denied to him by a final judgment passed on and affirmed by the highest court of New York (*Taylor* v. *New York Central*, 294 N. Y. 397).

The Federal Question; the Presentation Thereof in Each of the State Courts

The federal question is whether the petitioner, as a porter on a Pullman sleeping car of an interstate railway train, comes within the purview and protection of the Federal Employers' Liability Act (U. S. Code, tit. 45, sec. 51 *et seq.*).

By way of defense to the petitioner's complaint (in the action which he brought 21 months after the accident), Central pleaded that, at the time of the injuries, the plaintiff was on board the train as an employee of The Pullman Company as a porter on one of its sleeping cars; that he received and accepted awards and compensation under the New York Workmen's Compensation Law and, under Section 29 of that Act, his cause of action against Central became assigned to The Pullman Company upon the petitioner's failure to bring the action within six months after the first award or within one year after the accrual cause of action (R., pp. 8-10).

The petitioner, in reply to this defense, pleaded, in substance, and among other things, that, at the time of the accident, he was on the train as a railway employee employed in interstate carriage and, therefore, by virtue of the Federal Employer's Liability Act and the Constitution of the United States, the New York Workmen's Compensation Law had no application to him and his cause of action was immuned from, and unaffected by, the limitations and impairment prescribed by the State act (R., pp. 11-12).

By consent, the issues raised by the affirmative defenses and reply thereto were tried first (R., pp. 17-19).

After the facts bearing upon these issues were adduced and after hearing counsel (R., pp. 19-38), the Trial Court

held that the New York statute applied and the Federal Employers' Liability Act did not apply, and that under the former, by reason of the failure to bring this action within the above referred to six months or one year periods, the petitioner was "divested of the right to bring this action" (R., p. 39).

The petitioner also urged that, under the peculiar facts of the case, even if the State law controlled, the six months and one year provisions were inapplicable under a proper construction of the State statute; but since that, too, was overruled, it is of no moment here.

On his intermediate appeal to the Appellate Division of the New York Supreme Court, petitioner presented and urged the federal question above indicated.

Petitioner reiterated those points in the Court of Appeals, and they were passed on in detail by that Court in its opinion affirming the judgments of the lower courts (294 N. Y. 397, 402-405).

Opinions Below

The opinion of the Court of Appeals is reported in 294 N. Y. 397.

The decision of the Appellate Division was without opinion (269 App. Div. 662, 53 N. Y. S. 2d 469).

The opinion of the Trial Court is unreported. It is contained in the record at page 39.

The Case in Brief

There is no dispute as to the facts on which this case has been disposed of.

On April 19, 1940, while on board one of Central's trains enroute from New York to Chicago, petitioner was

injured in a derailment accident as the train was passing through the City of Little Falls in Herkimer County, New York (R., pp. 5-7, 26, 31).

The petitioner was on the derailed train as a porter of one of the Pullman sleeping cars which was part of the train (R., pp. 27-29). He boarded the train in New York (R., p. 31) and was to serve as a porter on that train throughout the whole trip to Chicago and was to be a porter on a returning Central train from Chicago to New York (R., p. 26).

The sleeping car on which petitioner served as porter constituted part of the train and railway service under a contract between The Pullman Company and Central, which is in the Record as an exhibit (R., p. 27; Pltf.'s Ex. 1, R., pp. 40-65).

That contract required the furnishing by The Pullman Company of sleeping cars and parlor cars "to meet the requirements of travel" over the Central lines and also "combined baggage and club and other non-revenue cars" and for the operation thereof as an integral part of the Central railway system under a coordinated service-revenue-profit-responsibility sharing basis. The Central, among other things, hauls the cars, sells the tickets therefor, heats or cools and ventilates them, keeps them inspected and lubricated (R., pp. 45-47); The Pullman Company furnishes the cars and facilities and services therein (R., pp. 40-43, 47-48). The income (after deduction of certain of the expenses) is divided between the two companies, 20% and 80% to a certain point, then 60% and 40% up to another point and thereafter equally (R., pp. 52-61; a fuller synopsis of the terms of the contract appears at pp. 19-20, *infra*).

Petitioner was hired and paid and controlled by The Pullman Company; but petitioner urges, as he did, in the courts below, that, in reality and in law, by reason of the joint venture character and the provisions of the con-

tract between The Pullman Company and Central, the car was operated jointly by The Pullman Company and Central—by the latter at least as much as by the former—and, accordingly, he was the employee of both (R., pp. 10-12, 27-29). This, however, is petitioner's secondary argument, his primary contention being that in fulfilling its part of the above contract, The Pullman Company, itself, was a "carrier by railroad."

Shortly after the accident, The Pullman Company, as a *voluntary* self-insurer under the Workmen's Compensation Law of the State of New York, *voluntarily* commenced to pay to the petitioner workmen's compensation under the New York Law, and it filed with the State Department of Labor a notice to that effect (R., pp. 35-36; Pltf.'s Ex. 2, R., p. 67). Months later, on October 1, 1940, and a number of times thereafter, the State Department of Labor made various awards in favor of the petitioner which The Pullman Company paid (R., pp. 32-34). Up to the date of trial, on May 29, 1944 (R., p. 17) petitioner was paid by The Pullman Company a total of $3,324.39 which petitioner retained (R., p. 34).

On January 30, 1942 (R., pp. 1, 33)—21 months after the accident—petitioner brought suit in the Supreme Court of the State of New York against Central to recover damages for his injuries. He alleged in his complaint that the injuries were permanent and were suffered by him through the negligence of Central in the operation of the train (R., pp. 6-7). At the trial petitioner's counsel stated that he was "prepared to show that as a result of those injuries the plaintiff has been disabled for life" (R., p. 17; see R., pp. 33-34).

The New York Workmen's Compensation Law, under Section 29 thereof, provides that where an employee is injured in the course of his employment because of the negligence of a person other than his employer, he may have his remedy against such third party as well as his

compensation under the Workmen's Compensation Law; but in the event of a recovery, the net proceeds must be first applied to the reimbursement of the amounts received under the Compensation Law, and the balance is retained by the injured worker.

The same Section provides further that if the injured worker fails to bring action against the third party within six months after the first compensation award is made in his favor and paid, or, in any event, within one year after the accident, "such failure shall operate as an assignment" to the compensation payer of the injured worker's cause of action against the third party. However, in the event of a recovery by the compensation payer as such assignee, the statute provides that two-thirds of the excess of the recovery over the compensation paid goes to the injured worker.

In overruling the petitioner's contention that, under *New York Central* v. *Winfield*, 244 U. S. 147, the New York Workmen's Compensation Law had no application to him, as an interstate railway employee, the State courts have held that (1) the Federal Employers' Liability Act does not apply to The Pullman Company because, as "an operator of sleeping cars" it is not a "common carrier by railroad" within the meaning of that Act, and (2) despite the contract between The Pullman Company and Central for the operation of the sleeping cars as part of the latter's railway service on a service sharing and profit sharing and joint account basis, petitioner in no sense was an employee of Central and was the employee *solely* of The Pullman Company.

As to the first mentioned of these holdings, the New York Court of Appeals in its opinion acknowledged that *there is "no express holding in the cases" to that effect* (294 N. Y. 397, at p. 404), but nevertheless thought that "the answer seems plain enough" (*id*).

In holding that petitioner was in no sense an employee of Central, the New York Court of Appeals said that that aspect of the case was controlled by *Robinson* v. *Baltimore & Ohio Railroad Company*, 237 U. S. 84 (at pp. 403-4).

The Questions Presented

It is clear that as a porter on an interstate railway, the plaintiff, if he were in the direct employ of Central (the defendant), would be under the protection of the Federal Employers' Liability Act and his cause of action would in no wise be affected by any provision in the New York State Workmen's Compensation Law and he would have a clear right to maintain his suit against Central (*New York Central Railroad* v. *Winfield*, 244 U. S. 147).

1. The first question, therefore, is: Assuming that the petitioner was exclusively in the employ of The Pullman Company, is he thereby in a category so basically different that the Federal Employers' Liability Act has no application to him?

The holding of the New York courts that porters on interstate trains, doing the same work, are under one law—the Federal Employers' Liability Act—if they are employed directly by the operator of the railway system and under another law—the State law—if they are employed through The Pullman Company, seems clearly illogical, arbitrary and unjust.

Is such a differentiation dictated, or even warranted, by the provisions of the Federal Employers' Liability Act?

This question, as recognized by the Court of Appeals, *has not been passed on by this Court*, or any other federal court.

2. The second question is: If employees of The Pullman Company, as such, are excluded from the coverage of the Federal Employers' Liability Act, when such employees

serve on railways to render railway service, are they not *pro hac* also employees of the hauling railway company?

This question presents several subsidiary questions:

a. Did *Robinson* v. *Baltimore & Ohio Railroad Company, supra,* pass on this point? We maintain that it did not (see pp. 21-23, *infra*).

b. If *Robinson* v. *Baltimore & Ohio Railroad Company* did pass on this point, is the contract in this case between Central and The Pullman Company so substantially different that in this case, even if not in the *Robinson* case, the operation was a joint venture and the porter was as much an employee of the railroad operator as of The Pullman Company? We maintain that the answer is yes (see pp. 18-21, *infra*).

c. If *Robinson* v. *Baltimore & Ohio Railroad Company* stands in the way of equality of status and rights, under the Federal Employers' Liability Act, of all railway employees engaged on interstate trains, should that case not be overruled?

Reasons for Granting the Writ

1. As acknowledged in the opinion of the Court of Appeals, *neither this Court nor any lower federal court* has held that railway employees engaged in interstate carriage are outside the purview of the Federal Employers' Liability Act when employed by The Pullman Company. This case, thus, presents questions of federal law not heretofore passed on by this Court.

The cases relied on by the New York courts as affording so close an analogy or parallel as to warrant the conclusion that this Court would hold that railway employees such as petitioner are excluded from the Federal Employers' Liability Act, we submit do not warrant that conclusion.

Those cases are *Wells Fargo & Co.* v. *Taylor*, 254 U. S. 175, and *United States ex rel. Chicago Refrigerator Co.* v. *Interstate Commerce Commission*, 265 U. S. 292. But neither of those cases involved employees rendering railway service, as we point out more fully at pages 15-16, *infra*.

2. The railways and their labor relations, including the setting up of proper standards and safeguards for the employees, have been a major national concern for decades. Throughout those years, there has been emphasis, reflected in the decisions of this Court, on the necessity of uniformity—and, therefore, of exclusively national—regulation and control. The decisions here sought to be reviewed are in conflict with that national major objective and thus present a question of substantial public interest.

3. This case is of great importance to petitioner. Under the Federal Employers' Liability Act he is entitled to *full compensation—instead of only the fraction* provided for by the New York Workmen's Compensation Law —for the monetary loss imposed by his disability for life, and to an adeqaute allowance—*instead of nothing*—for his pain and suffering and for the impairment of his enjoyment of life and its normal pursuits.

4. The questions presented are important also to an entire, and not unsubstantial, class—the persons employed, in interstate carriage, on Pullman cars.

Prayer

WHEREFORE, petitioner respectfully prays that this petition for a writ of certiorari to review the complained of judgments be granted.

Dated: New York, November 2, 1945.

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By: COPAL MINTZ,
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